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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 20844/20

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 12/09/2024

SIGNATURE

In the matter between:

E[...] C[...] S[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

KRÜGER AJ:

Summary

Motor vehicle accident- Claim against Road Accident Fund- Apportionment considered- Causality considered- Liability of Road Accident Fund for medical expenses paid for by medical aid scheme and subrogation considered- Litigation — Prejudice to plaintiff — Punitive costs order — Fund's conduct of case resulting in

prejudice and wasted time and costs — Punitive costs order on attorney and client scale justified.

Introduction

- [1] At approximately 06:50 on 22 October 2018 and at the intersection of Empire Road and Jan Smuts Avenue, Parktown, Johannesburg, a collision occurred between a motorcycle driven by the plaintiff and a Toyota minibus (*“the minibus”*) driven by one Mr Lamolani Dladla (*“the insured driver”*). The plaintiff claims damages suffered as a result of the collision for past as well as future medical and hospital expenses, past and future loss of earnings and general damages.
- [2] The plaintiff alleges the collision occurred solely as a consequence of the negligent driving of the insured driver in that he, amongst others, entered the intersection in a manner which was inappropriate and/or dangerous in the face of oncoming traffic, failed to keep a proper lookout and/or have regard to other road users and/or failed exercise proper care and failed to avoid a collision when by the exercise of reasonable care he could and should have done so. In the result, the plaintiff suffered severe injuries being a comminuted fracture dislocation of her left elbow and comminuted (open book) fractures of her pelvis and sacrum, displacement of her uterus and bladder as well as lacerations and hematomas to her left elbow, groin and both knees. She was hospitalized at the Netcare Milpark hospital where she was resuscitated and received extensive treatment and rehabilitation. On 27 October 2018 she underwent surgery in the form of an open reduction and internal fixation of her pelvis and left elbow. The plaintiff was treated in the intensive/high care unit for 19 days and then transferred to a general ward. On 15 November 2018 she was discharged and then admitted to the Netcare Rehabilitation Hospital until 21 December 2018. Here she received physiotherapy and occupational therapy towards rehabilitation. On 13 May 2019 she was again admitted to the Netcare Milpark Hospital where she remained for two days as an in-patient undergoing surgical repair of a hernia.

- [3] The defendant's plea is for the most part a bald denial. It denies negligence on the part of the insured driver. In the alternative it pleaded the collision was caused by the plaintiff's negligence amongst others on the grounds that she failed to keep a proper lookout and/or apply brakes timeously and/or take adequate steps to avoid the collision and/or that she drove at an excessive speed. As a further alternative, the defendant pleaded contributory negligence.
- [4] In terms of section 17(1A)(a) of the *Road Accident Fund Act* 56 of 1996 ("the Act") the injuries suffered by the plaintiff are typified as serious injuries. The quantum of general damages was settled between the parties at R 750 000,00. Quantum in respect of past medical and hospital expenses were settled at R 256 429,33 and R 566 453,10 respectively, the only dispute remaining being whether the defendant is legally liable for payment. Regarding future medical and hospital expenses, the defendant tendered delivery of a statutory undertaking in terms of section 17(4)(a) of the Act subject to liability apportionment.
- [5] The plaintiff's expert reports of Professor Scheepers an orthopaedic surgeon, Professor Bizos a gastroenterologist and Dr Shevel a psychiatrist were admitted to by the defendant.
- [6] What remains is for the court to determine liability and the percentage of apportionment, if any, causation and the quantification of loss and the legal issue of subrogation pertaining to the defendant's liability for past medical and hospital expenses.
- [7] The plaintiff called as witnesses the plaintiff as well as Mrs Myburgh an occupational therapist, Ms Donaldson an industrial psychologist and Mr G. Whittaker an actuary. No witnesses were called on behalf of the defendant, nor were any expert reports filed in terms of Uniform Rule of Court 39(9) on its behalf.

On the merits pertaining to liability regarding the collision and apportionment

- [8] The only evidence presented as to how the collision occurred is the testimony of the plaintiff as well as a series of photographs taken at the scene of the collision soon after it occurred. In general the photographs record the scene of the collision, the respective positions after the collision of the minibus driven by the insured driver and the motorcycle driven by the plaintiff. It also shows where the plaintiff was lying after the collision whilst being attended to by emergency services.
- [9] The plaintiff's commenced her testimony with a description of the events leading up to the collision. She is an experienced biker having used it for a decade. The motorcycle she was riding on the day of the collision was a Yamaha 900cc and acquired by her 2 years previously. She was very comfortable riding it. It was her usual mode of transport to her place of employment and back to her home west of Johannesburg in all weather conditions. On the morning of the collision she was travelling in an easterly direction in Empire Road, Johannesburg on her way to work. At the robot controlled intersection with Jan Smuts Avenue she stopped because the traffic light was not in her favour. The intersection has four lanes, two for travelling across the intersection and two for turning to her right into Jan Smuts in a southerly direction. She was in the right hand lane for vehicles wishing to cross the intersection in an easterly direction. When the traffic light turned to green allowing her to cross the intersection, she commenced moving across the intersection in an easterly direction.
- [10] She noticed the minibus entering the intersection at speed from the opposite direction unexpectedly turning to its right into Jan Smuts Avenue in a northerly direction in disregard of the traffic light controlling traffic travelling from an easterly direction in Empire Road intending to turn to their right in a northerly direction in Jan Smuts Avenue. In an attempt to avoid the collision, the plaintiff brought her motorcycle to an immediate stop, to no avail. The front of the minibus hit the plaintiff's motorcycle on the front wheel whilst stationary. She lost consciousness. During cross examination the plaintiff testified that she was first in line to enter the intersection when the traffic light turned green for her. The minibus was close when she noticed it turning and she stopped. Things

happened very quickly and she couldn't turn to her left or right. She did not know if there were other vehicles to her left or right. According to the plaintiff, the only course of action was for her to stop as she was travelling slow enough to do so. She further testified under cross examination that the weather conditions were fine, her motorcycle was in a good condition and the brakes worked properly. It is a wide intersection which she knows well. She was adamant that the insured driver skipped the traffic light which was red for vehicles intending to turn right from Empire Road into Jan Smuts such as the insured driver. She insisted she had right of way and that by stopping she did the only thing she could. The plaintiff testified further that when she regained consciousness she was in excruciating pain. There were people around who comforted her and contacted her family.

[11] No witnesses were called by the defendant to present a contrary version of events. Instead, the defendant's legal representative unsuccessfully sought to extract concessions from the plaintiff during cross examination. In my view and from observing the plaintiff in the witness stand, she was forthright and honest in her responses to questions. She was unmoved by cross examination.

[12] Photographs of the scene of the collision were taken shortly after the collision occurred by bystanders. They were discovered in terms of Uniform Rule of Court 36(10). The defendant raised no objection as provided for in Uniform Rule of Court 36(10)(b), nor was the photographs challenged during the hearing of the matter. Some of the photographs record the positions where the motorcycle, the plaintiff and the minibus were after the collision relative to each other. One of the photographs is taken in a northerly direction down Jan Smuts Avenue from the edge of the intersection with Empire Road. It shows three lanes of traffic for vehicles travelling north up Jan Smuts Avenue. There are several lanes for traffic travelling in a southerly direction down Jan Smuts Avenue as well as slipway for traffic travelling in a southerly direction towards the intersection for traffic wishing to turn east in Empire Road. The traffic lanes for traffic travelling south down Jan Smuts is separated from those for traffic in a northerly direction by what appears to be a concrete barrier. The minibus can be seen on the right hand side of the photograph close to the barrier between

the lanes. The plaintiff is lying on the road surface next to a stretcher close to the barrier. It shows emergency services and a tow truck on the scene with several bystanders.¹

[13] Two other photographs record damage to the front headlight and front wheel of the motorcycle.² Other photographs of the motorcycle from different angles show little damage to the rest of it.³ Other photographs show the minibus and clearly record the damage to it. The greatest impact is to the middle of the front of the minibus.⁴ The front windshield was shattered and expelled from the minibus.⁵ Several photographs record the position of the minibus after the collision with its nose touching the curb separating the lanes in the middle of Jan Smuts Avenue.

[14] I can find nothing in the photographs which may contradict the plaintiff's version of how the collision occurred. To the contrary. The photographs record the severity of the impact. The velocity and force of the minibus in hitting the motorcycle were such as to expel and shatter its windshield, dislodging the front bumper, causing a severe concavity to the front of the minibus and propelling the plaintiff and her motorcycle into Jan Smuts Avenue. It is indicative of the excessive speed at which the minibus was travelling when it entered the intersection and turned to its right towards Jan Smuts in a northerly direction.

[15] Having regard to the plaintiff's evidence and upon an analysis of the photographs, the conduct of the insured driver demonstrated an absence of consideration to the consequences of the manner he drove the minibus. He entered the intersection turning to his right against a red light, thereby causing the collision with the plaintiff and her motorcycle which had come to a stop prior to the collision in an attempt to avoid the collision. I find the conduct of the insured driver, regard being had to the prevailing circumstances, to have been

¹ CL26-28. See also CL26-44 and CL26-46

² CL26-23, CL26-24 and CL26-45

³ CL26-26, CL26-51 and CL26-52

⁴ CL26-31, CL26-34 and others

⁵ CL26-49 and CL26-50

an extreme departure from what one would have expected from a reasonable person in his shoes at the time. In short, the insured driver was grossly negligent.⁶

[16] On behalf of the defendant it was argued that an apportionment of 70/30 should be awarded in favour of the plaintiff in terms of the *Apportionment of Damages Act*, 34 of 1956 on the grounds that the plaintiff was negligent as set out in the defendant's plea which I referred to above. I disagree. The plaintiff was entitled to expect that the insured driver would observe the traffic codes and conventions and not act recklessly or with gross negligence.⁷ She was entitled to expect the insured driver to heed the traffic lights and not enter the intersection at that time and proceed towards Jan Smuts Avenue. In turning across the path of travel for oncoming traffic, the insured driver executed an inherently dangerous manoeuvre and bore a stringent duty to do so only after satisfying himself that it was safe and opportune to do so,⁸ which he failed to do.

[17] Counsel for the plaintiff referred me to *Naiker v Moodley*⁹ in which Swain J held that a driver on a vehicle entering an intersection whilst the traffic light is in his/her favour owed no duty to traffic entering the crossing in disobedience to traffic lights. A driver's duty upon entering an intersection when traffic lights are in his or her favour, is to take all reasonable steps upon observing the transgressing driver to avoid a collision. I am in agreement with that judgment.

[18] It remains then to determine if the plaintiff, having observed the insured driver turning to his right and then electing to bring her motorcycling to a standstill,

⁶ *MV Stella Tingas; Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and another* 2003 (2) SA 473 at [7]

⁷ *Griffiths v Netherlands Insurance Of SA Ltd* 1976 (4) SA 691 (A) at 695G: "Applied in traffic cases to the driving of a motor vehicle, the concept of negligence takes account of the codes and conventions which normally govern the movement of vehicular traffic on public roads. Users of the road, whether they be vehicle drivers or pedestrians, normally regulate their conduct on the supposition that these codes and conventions will be generally observed by other users. Consequently, a departure from these codes and conventions will often give rise to a situation which is unexpected and dangerous and, in certain circumstances, will amount to negligence."

⁸ *AA Mutual Insurance Association Ltd v Moneka* 1976 (3) SA (A) at 52E

⁹ 2011 (2) 502 (KZD) at [20]

might reasonably have done something else in order to avoid the collision. Counsel for the defendant argued the plaintiff might have taken alternative evasion action. I find such argument to be without merit. No evidence was presented by the defendant of whatsoever nature indicating that the plaintiff may have been negligent in her conduct. Nor is there any inference to be drawn from the facts before me that the plaintiff's conduct was negligent in any way which may have contributed in causing the collision.¹⁰ Having regard to the applicable legal principles and the evidence presented, I find that the insured driver was the sole cause of the collision and is 100% liable.¹¹

Evidence pertaining to causation and quantification of loss of earnings and earning capacity

[19] The plaintiff testified that prior to the collision she was an active, health conscious person who exercised frequently and was involved in body building. She excelled at her employment and pursued various avenues to advance her education and marketability in her field of employment. She was considered to be a dedicated and loyal employee and regularly achieved promotion and financial increases. From being a bookkeeper she was promoted to the position of financial manager which included duties previously entrusted to a chartered accountant. She was a problem solver and maintained outstanding working relationships with others at her place of employment. She was entrusted with successfully implementing, establishing and managing systems as well as training staff in all core outcomes. Her life revolved around her work and the necessity of her being the main breadwinner for herself, her daughter and disabled son. She elected her employer due to its international connections and the opportunities it made available.

[20] After the collision she experienced degradation of her memory and suffered continuous pain, physical and mental fatigue as well as anxiety. The plaintiff returned to work with the firm intention to fully resume her pre-collision duties

¹⁰ *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614G-A: "...it is not necessary...the inference sought to be drawn is the only reasonable inference- it will suffice if it is the most readily apparent and acceptable inference from a number of possible inferences"

¹¹ See also the as yet unreported case of *Mbokane v Road Accident Fund* (2188/17) [2019] ZAGPPHC 513 (31 January 2019)

and believing she would be up to it. Despite her best attempts, she found that she struggled to achieve what she previously was capable of but hoped that it would improve over time. Her work required great accuracy which she had difficulty complying with. The plaintiff had embarked upon an H Dp Tax course which after the collision she was unable and failed to complete in the initial allotted time. The plaintiff eventually obtained the qualification later at a substantially reduced pace.

[21] Fearing her condition would become known and reflect upon her continued prospects as an employee, she tried to adapt by working longer hours and making notes to aid her failing memory. She also delegated some of her work to others when she finally realised that her ability to produce quality work had diminished and would possibly not recover. Her coping strategy failed from time to time. The plaintiff suffered loss of self-confidence and became socially withdrawn. Previously she was informed by her London based manager that an intended restructuring at Kubapay would be built around her. In attempting to deal with the effects of the injuries she had suffered and her resultant stress and anxiety, the plaintiff commenced taking mood stabilizers. She is appalled at the charges that was levelled against her in respect of a proposed disciplinary hearing and denies that she was guilty in particular of any dishonesty, although she admits to having made errors in critical figures she submitted to her London based colleagues. This was as a result of her failing ability to cope with her duties following upon the injuries suffered during the collision and the consequences thereof.

[22] Upon leaving her employ following the conclusion of a mutual separation agreement, the plaintiff sought and found alternative employment as financial manager with the Herbert Evans Group. Unfortunately, she was unable to cope with the demands and management of their accounting system, despite her efforts to do so, for example by making copious notes to aid her memory. The Herbert Evans Group went into business rescue. The plaintiff found alternative employment at a much reduced salary and with little prospects of improvement.

[23] An occupational therapist, Mrs Myburgh testified as to the physical and psychological effects of the injuries sustained by the plaintiff. She found the plaintiff was unable to run and perform exercises such as she did before the collision. She experienced impaired movement to her one elbow and pain when attempting to extend it. The plaintiff suffered from occasional headaches and was left with unsightly scarring, also on intimate parts of her body, which negatively impacted upon her self-esteem and confidence. Her physical abilities were found to be significantly impaired. Her left elbow was stiff which diminished all bilateral hand activities. The plaintiff's gait was impaired resulting in mild limping, slow speed in walking with limited endurance. She was unable to squat and found it difficult to do work below knee level. The plaintiff suffered pain in her lower back, hips and left elbow and complained of pain in her lower back and right hip respectively when sitting or walking for prolonged periods. She found the plaintiff to have strong drive and sense of responsibility. During assessment, the plaintiff's emotions were labile. The mood stabilizer taken by the plaintiff is reported as being Epitec from which she benefits. The chronic pain and discomfort the plaintiff is subject to reinforce psychological difficulties which in turn emphasises the pain she is suffering. In Mrs Myburgh's experience, it may well over time cause cognitive difficulties and further impairment of her ability to perform at work. Mrs Myburgh recommends, amongst others, further pain management from a multi-disciplinary team of specialists as well as numerous devices to assist her. Psychological support and pain management is expected to assist the plaintiff in remaining gainfully employed. The plaintiff is a vulnerable employee in the labour market, and provision for future loss of income is indicated. She is limited to sedentary work only, but needs special cushions to sit on, regularly changing between sitting, standing and walking. Her productivity is expected to be lower than prior to the collision due to continuing pain and discomfort as well as emotional impairment.

[24] An industrial psychologist, Mrs Donaldson, testified extensively on the results of her assessments and observations of the plaintiff with reference to a plethora of documents which included, amongst others, documents pertaining to the proposed disciplinary enquiry, separation agreement, *curriculum vitae*, reference letters, academic record and the like. An assessment lasts for some

6 hours and is designed to simulate a working day. The plaintiff was first assessed on 16 August 2021 and again on 21 February 2024.

[25] According to Mrs Donaldson, the plaintiff during her assessments made no attempts to dramatize her situation or gain sympathy. The plaintiff was observed to suffer discomfort and moved regularly to remove such discomfort. When she at times became emotional during the assessment the plaintiff was discomfited by such loss of control. She was proud of her attempts at rehabilitation. During the first assessment she tried hard to be the person she was before the collision and did not want to be “damaged goods.” The second assessment revealed the plaintiff is finding it increasingly difficult to keep up a stoic approach to her prevailing circumstances. She is becoming increasingly aware of her loss of memory and lack of concentration and became emotional when having to talk about her reduced efficiency. The plaintiff appeared weary and in pain. She presented with deepening levels of depression. Mrs Donaldson’s opinion is that the plaintiff is a self-made woman with substantial determination. Kubapay was where the plaintiff settled and where she envisaged her future to be, not contemplating leaving. She earned a lot of money at the time, up to R 1 405 million per year, commensurate with the earnings of top management. The plaintiff was esteemed by others in her workplace as is reflected in her career trajectory. Progress up to a Patterson D5 level, such a Financial Manager, accords with expectations but it is unlikely she would have advanced to the level of a director.

[26] The plaintiff’s post-collision decline in income and work opportunities are unsurprising and was to be predicted, regard being had to the nature and extent of her injuries. Though she is actively seeking better employment, her attempts were in vain. She would be obliged to inform any prospective employer of her difficulties which manifested by virtue the injuries she suffered. In Mrs Donaldson’s vast experience over decades, it would be rare for an employer to be prepared to overlook the concatenation of the plaintiff’s difficulties, more particularly due to her age. She puts it thus: “...women tend to considered ‘old’ in the job-seeking stakes by the time they are 45 years of age. A woman of 50 with all of her health related difficulties, which in Mrs Steyn’s

case are frank difficulties, and which would portend regular and at times lengthy absences from the workplace, would not be regarded as a desirable potential employee. Should Mrs Steyn's difficulties lead to premature retirement (as anticipated by Ms Myburgh), this would be another serious problem for a prospective employer...it does not seem unreasonable to accept that it is improbable that Mrs Steyn would be the preferred candidate when she is in competition with her hale, able-bodied, similarly qualified and experienced peers."

[27] In Mrs Donaldson's expert opinion, incessant pain, depression, mental and psychiatric anguish, post-traumatic stress outcomes as well as impaired productivity and memory are interconnected. It feeds into one another. It is permanent in nature and there is no complete cure. The plaintiff has deteriorated into being a highly vulnerable individual. The collision was, as Mrs Donaldson put it, the 'primal event' causing the plaintiff's current circumstances.

[28] According to the psychiatrist's uncontested report, the plaintiff was examined on 8 November 2021. The plaintiff informed him that she was experiencing significant pain in her right groin as well as lower back pain when sitting too long and pain over the anterior part of her pelvis when walking. She stated the daily level of pain was between 6 and 7/10 which at times flared up to 9 and 10/10 which is medicated with Stilpane and Grandpa Powder. For persistent pain her general practitioner gives her a cortisone injection which provides temporary relief. Amongst a multitude of difficulties, it is necessary to soften her stools with Softlax, but occasionally she requires a suppository for relief. She has difficulty with micturition. She appears to have developed an incisional hernia and may have a right inguinal hernia which requires further investigation. The plaintiff is diagnosed with Dysthemia and associated anxiety secondary to chronic pain following upon severe orthopaedic injuries associated with continuing physical impairment. She requires psychiatric treatment in the long term, as well as psychotherapy. Her occupational functioning is adversely affected, largely due to her physical injuries. The chronic pain, dysthymia and anxiety will significantly aggravate her ability to function at a pre-collision level and her psychiatric condition has a negative impact on interpersonal skills and

relationships. Her work capacity is at a lower level that could have been expected had she not been injured in the collision.

[29] In the admitted report of the gastroenterologist, it is recorded that the plaintiff has a right groin lump/small hypoechotic formation measuring 10.7 x 5.6mm. She would require treatment for constipation, a hernia repair (which was attempted). The developing bowel obstruction will require conservative treatment and possibly surgical intervention.

[30] The report of the orthopaedic surgeon follows upon an examination of the plaintiff on 30 March 2021, around 2.5 years after the collision. It sets out in detail the physical consequences of the collision upon the plaintiff's body and the evidence of treatment she had received. For the purposes of this judgment it is unnecessary to record all of it herein. The defendant admitted to the report and the facts stated therein are not disputed. The orthopaedic surgeon confirms the impairment of the plaintiff's mobility and the scars left upon her body due to surgical repair of the injuries she suffered in consequence of the collision. Significantly, the prognosis for the plaintiff is poor in his opinion. She requires continuous conservative treatment, use of anti-inflammatories and analgesics as well as on-going physiotherapy. He foresees the possibility of a future hip replace being required. Regarding her employment, he defers to the opinions of either an Occupational Therapist or an Industrial Psychologist.

[31] The actuary, Mr Whittaker of some 25 years' experience, was called to give evidence regarding his report dated 8 April 2024 at the defendant's insistence. He had been asked to report on the capital value of the loss of income sustained by the plaintiff as a result of the collision. The general contingency deductions applied in his calculations towards earnings for pre morbid past and future loss of earnings were both at 5%. For post morbid earnings a contingency of 5% was applied towards past and 15% towards future loss of earnings. In his opinion, the applied contingency differential of 10% is factually well founded and fair. As regards loss limits provided for in section 17(4)(c) of the Act, Mr Whittaker explained that the limit of R 160 000,00 per year is adjusted quarterly was taken as R 273 863,00 per year with reference to the

date of the collision. He testified that the loss limit had been applied in terms of the *Sweatman* matter.¹² The plaintiff's income used to compile his report was in accordance with those recorded by the industrial psychologist as well as proven facts. According to Mr Whittaker an upward adjustment of the pre-morbid contingency to 30% would not decrease the plaintiff's nett recoverable damages.

Analysis and consideration regarding causation and quantification of loss of earnings and earning capacity

[32] The defendant's attack pertaining to causation focussed upon the plaintiff having been the subject of a disciplinary inquiry by her employer after the collision on alleged charges involving dishonesty and gross negligence. The plaintiff signed a mutual separation agreement, receiving severance package of R 953 915,00. Counsel for the defendant also sought to accuse the plaintiff of inappropriate consumption of whiskey. The defendant argues that, in the result "...there is no nexus between her injuries and her loss of earning and or earning capacity". It is proposed on behalf of the defendant that contingencies for pre- morbid future loss of earnings should be 40.5% and post morbid 20%. The defendant puts the plaintiff's total loss of earnings at R 1 920 257,27. As set out below, I find the defendant's arguments to be without merit.

[33] In delict, determination of causality generally entails two distinct enquiries- factual causation and legal causation. As to factual causation, it must be established if the postulated cause of an event can be identified as the *causa sine qua non* of that event. The test applied is referred to as the 'but-for' test:

¹² *Sweatman v Road Accident Fund* Mr Whittaker testified he was involved in that matter. He had written two articles about it in *De Rebus*, the last in the March 2014 edition of that journal which he co-authored: "The correct interpretation of s 17(4)(c) of the Road Accident Fund Act 56 of 1996". The judgment was upheld on appeal- see *Road Accident Fund v Sweatman* [2015] 2 All SA 679 (SCA). It is referred to as 'the Morris method'. The court held it "...starts from the text of section 17(4)(c). That provides that the annual loss must be compared with the actual loss (the estimated value of the loss), and the lesser sum awarded. The annual loss is that determined by notice in the Government Gazette. And the quantum of the annual loss, provides section 17(4A)(b), is that "set out in the last notice issued prior to the date on which the cause of action arose" – that is, the date of the accident. Accordingly, following the Morris method, if in each year after the accident the actual loss exceeds the annual loss determined at the date of the accident, the Fund is liable to pay only the lesser amount – the annual loss." The judgment was upheld on appeal- see *Road Accident Fund v Sweatman* [2015] 2 All SA 679 (SCA)

“...one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote.”¹³

[34] As regards legal causation, the issue essentially is the extent to which liability may be limited for conduct which factually resulted in the loss suffered. This is to be done in a flexible manner in which the direct consequences of the conduct, reasonable foreseeability of its consequences and adequate causation may be relevant as subsidiary determinants. The result arrived at must not be so unfair or unjust that it will be regarded as untenable; it must be acceptable to right minded people.¹⁴ Various factors may be taken into account such as directness, reasonable foreseeability; fairness, justice, reasonability, legal policy and the absence or presence of a *novus actus interveniens*.¹⁵

[35] The defendant's reference to the plaintiff's consumption of whiskey originates from paragraph 3.6.5 of the industrial psychologist's report which reads as follows:

¹³ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700ff. See *Heyns v Venter* 2004 (3) SA 200 (T) at [9] to [11].

¹⁴ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2009] (1) All SA 525 (SCA) at [31]. See *Minister for Safety and Security v Scott and Another* [2014] JOL 31945 (SCA) at [37] to [38].

¹⁵ *Standard Chartered Bank of Canada v Nedperm Bank Ltd* [1994] 2 All SA 524 (A) at 537. See also Van der Walt & Midgley *Principles of Delict* Fourth Edition par 181 and the judgments there cited as well as their valued interpretation.

“She appears to be an individual of temperate habits. She reports that she has stopped taking Tramacet which has eased her feelings of “fuzziness and foggiess” somewhat and instead takes Stilpane and GrandPa Powders. She also takes Epitec as a mood stabiliser. Prior to the accident, she was a social smoker who smoked 3 to 10 cigarettes per day, but says that she has now given up smoking completely which she attributes to the ban on cigarettes during the hard Covid-19 lockdown restrictions. She enjoys a whisky with flavoured water, but drinks less now because “if I drink, I become very sad”.”

During faint cross-examination as to her drinking habits, the plaintiff was adamant that she did not drink whiskey excessively prior to the collision or thereafter. There is no evidence that the consumption of whiskey played any role or contributed to the plaintiff's loss of employment, earnings or earning capacity. No other relevant expert, be it the occupational therapist, the industrial psychologist or psychiatrist made any finding of the use of alcohol being related in any way to the plaintiff's loss of employment, earnings and earning capacity. Having regard to all the evidence in this respect, I find that on a balance of probability the plaintiff's use of alcohol prior or after the collision is not the factual cause of her loss of earnings and earning capacity.

- [36] As regards the plaintiff's acceptance of a severance package upon the proposed disciplinary procedure on charges involving negligence and dishonesty, it is significant that this occurred around August 2023, some five years after the collision. At this point, the consequences of the injuries suffered by the plaintiff and its effect upon her had become more fully established. The industrial psychologist had examined the plaintiff before and after the incidents upon which the proposed disciplinary proceedings were to be based. A marked deterioration was noted in the plaintiff's mental well-being in the last report. Whereas it was noted in the first report that the plaintiff's had not at that time fully realised the consequences of her injuries upon her abilities and attempted to act as if she could perform as before, at the time of the second report it was becoming evident to the plaintiff that she was severely and irreversibly impaired by her injuries and their negative effect on her abilities.

[37] During the examination of the plaintiff for the last report, she stated that she disputed the charges against her but admitted she had made “slip ups” which she attributed to her significantly impaired memory and ability to concentrate following upon the collision. Prior to the proposed disciplinary procedure, the plaintiff was subjected to a battery of tests pertaining to cognitive functioning by the industrial psychologist on 16 August 2021.¹⁶ According to the tests, the plaintiff’s intellectual and associated abilities for the most part were average, but there is a marked anomaly in her scoring below average on the test for verbal reasoning, where she was unable to improve upon her score despite having been given extra time. The industrial psychologist noted that the particular test is given at the end of a 90 minutes session without a break, emulating the situation in a typical office prior to teatime in the morning and then working until lunch. The plaintiff was observed being uncomfortable during the first part of the test, that she was tiring and struggling to concentrate. The plaintiff’s answer sheets records numerous careless errors and getting easy items wrong, but more difficult items correct. The industrial psychologist concludes that the plaintiff’s verbal reasoning is less indicative of her ability to solve problems by means of verbal reasoning than it is an indication of what happens to her ability to reason when she is under time pressure and is suffering from pain, discomfort and fatigue.

[38] The findings of the industrial psychologist in this regard correspond with my observations of the plaintiff on the witness stand whilst testifying. She visibly tired during the course of giving evidence starting in the morning and became progressively more uncomfortable as time went on. My offer for her to give evidence whilst sitting was declined. The plaintiff stated that extended sitting increases her discomfort and pain over time due to her injuries, particularly the book end fracture of her pelvis and the effect on her bladder and the like. As the day progressed she became less focussed and her concentration seemed to fade. Having regard to the above and the testimony of the expert witnesses, in particular the industrial psychologist I am not at all persuaded of the defendant’s argument “...*there is no nexus between her injuries and her loss of*

¹⁶ CL08-75ff

earning and or earning capacity". To the contrary, having regard to all the evidence before court, I find on a balance of probabilities that the impairment of the plaintiff's abilities and her loss of earnings were factually and legally caused by the injuries suffered by her as a result of the collision and the effect thereof upon her.

[39] In argument the defendant's legal representative sought to cast aspersions upon the plaintiff and the actuary. It differs with my observations of the witnesses whilst giving evidence and the cogency of their testimony. The plaintiff struck me as a tenacious and stoic person who found it difficult to accept the effect of the injuries she suffered during the collision. Such aspersions are unwarranted and unsubstantiated.

[40] The figures relating to the plaintiff's pre-morbid earnings and her post morbid earnings were not disputed by the defendant, at least not seriously. These figures were referred to and used by the industrial psychologist as well as the actuary in the compilation of their respective reports and the actuarial calculation of the plaintiff's loss of earnings and earning capacity.

[41] Having regard to the evidence and testimony before court, I can find no reason to deviate from the actuary's report in respect of the contingencies proposed to be applicable. The nature and extent of the injuries suffered by the plaintiff and its effect on her in future in her employment and in the job market is indisputable on the evidence before me.¹⁷

Consideration and analysis of the legal issue of subrogation and res inter alios acta pertaining to past medical and hospital expenses

[42] The defendant also contended the plaintiff is not entitled to any medical expenses already paid by her medical aid for hospital and medical services. No argument in this regard was presented to court by the defendant. It seems it follows upon an internal directive dated 12 August 2022 in which the defendant's Acting Chief Claims Officer informed the defendant's regional

¹⁷ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at [9]ff; *MVA Handbook* Honey & Newdigate at 176

managers that, in summary, all medical expenses are to be rejected if a medical aid has already paid out a plaintiff for those expenses. In *Discovery Health (Pty) Ltd v Road Accident Fund and another*¹⁸ Mbongwe J, following upon an urgent application, ordered that the directive is declared unlawful, is reviewed and set aside. It was also ordered that the defendant is interdicted and restrained from implementing the directive.¹⁹ The court held that benefits received by a plaintiff in terms of a private insurance policy are not considered for purposes of determining the quantum of a claim for damages against the RAF.²⁰ I am in agreement with the reasons advanced by that court in finding as it did.²¹

[43] The *Discovery Health* judgment proved not to be the end of the defendant's insistence that it is not liable for payment of past medical and hospital expenses where it has been paid by a plaintiff's medical aid. Counsel for the plaintiff referred me to *Road Accident Fund v Sheriff of the High Court for the District of Centurion East and others*²² in which the RAF by way of urgent application sought an order staying a writ of execution. De Vos AJ held that practically there is no double compensation should a plaintiff be paid for past medical and hospital expenses because a plaintiff who has received indemnity under an insurance contract and afterwards recovers compensation in an action for damages from the wrongdoer is obliged to hand over to the insurer whatever money was received from the wrongdoer.²³ With reference to *Road Accident*

¹⁸ 2023 (2) SA 212 (GP) at [5] and [42]

¹⁹ In a judgment dated 23 January 2023, the RAF's application for leave to appeal was denied- see *Road Accident Fund and another v Discovery Health (Pty) Ltd* [2023] JOL 57502 (GP). It seems the Supreme Court of Appeal dismissed the RAF's application for leave to appeal on 31 March 2023. The Constitutional Court on 18 October 2023 concluded that the application for appeal to it did not engage its jurisdiction.

²⁰ *Discovery Health* at [21]: "In terms of our law, benefits received by a claimant from the benevolence of a third party or a private insurance policy are not considered for purposes of determining the quantum of a claimant's damages against the first respondent. The reason for this is merely because a benefit that accrues or is received from a private insurance policy originating from a contract between the insured and the insurance company [is] for the explicit benefit of the claimant and its receipt does not exonerate the first respondent from the liability to discharge its obligation in terms of the RAF Act."

²¹ See [15] to [40]

²² [2024] JOL 63261 (GP)

²³ The court relied upon *Ackerman v Loubser* 1918 OPD 31 at 36, applied in *Rayi NO v Road Accident Fund* [2010] JOL 25238 (WC). The court made reference to rule 14.5 of the Model Rules of the Council for Medical Schemes which provides that a member undertakes to submit the claim to the RAF and to refund the medical aid scheme.

*Fund v Abrahams*²⁴ and section 21(1) read with section 17(1) of the Act, the court confirmed the RAF is placed in the shoes of the wrongdoer and may not benefit in not paying for damages when a plaintiff has been prudent enough to obtain insurance. The court further held the well-established principle of *res inter alios acta* applies- a plaintiff's indemnification against damages resulting from a collision in terms of an insurance policy and the consequent subrogation of the insurer are of no concern to the RAF.²⁵

Apart from the above, the RAF argued that section 19(d)(i) of the Act excludes its liability when a claimant had entered into a contract with a medical scheme. The section stipulates that the RAF is not obliged to compensate any person in terms of section 17 of the Act where an agreement had been entered into with another in terms of which the latter undertook to pay the former after settlement of the claim a portion of the compensation in respect of the claim. The court applied the judgment in *RAF v Abdool-Carrim*²⁶ and *Van Tonder v Road Accident Fund and a related matter*²⁷ in rejecting the argument advanced by the RAF.

[44] I can find no reason to deviate from the judgment of De Vos AJ and the authorities relied upon by her.²⁸ In the result, I find the plaintiff is entitled to medical expenses that may have been paid by her medical aid for hospital and medical services she received.

Costs

[45] The plaintiff seeks punitive costs to be awarded against the defendant on the scale as between attorney and own client with the costs of counsel, where reasonably so employed, on scale C. The plaintiff's complaint is based upon the conduct of the defendant in dealing with the matter.

²⁴ 2018 (5) SA 169 (SCA) at [13]

²⁵ With reference to *Ntlhabyane v Black Panther Trucking (Pty) Limited* 2010 JDR 1011 (GSJ) and *Bane v*

D'Ambrosi 2010 (2) SA 539 (SCA)

²⁶ [2008] 3 All SA 98 (SCA)

²⁷ [2023] JOL 62098 (GJ) [2024] JOL 63749 (GP)

²⁸ Plaintiff's counsel also referred me to an unreported judgment in another division in which a similar finding against the RAF was made- see *Morné van Heerden v Road Accident Fund* (845/2021) [2022] ZAECQBHC 37 (4 October 2022)

[46] The constitutional court in *Public Protector v South African Reserve Bank*²⁹ 2019 (6) SA 253 (CC) by majority held that a court is bound to secure a fair and equitable outcome in deciding awarding costs with reference to the circumstances of the case. It confirmed that a costs award falls within a court's discretion and may be awarded when a court wishes to mark its disapproval of the conduct of a litigant. Where the conduct of a litigant has prejudiced another party the award of a punitive costs order may be justified.³⁰

[47] The conduct of litigation should promote speedy and cost-effective resolution of disputes. It is a collaborative effort in which the role of the legal representatives is the supervision, organization and presentation of evidence as well as the formulation and presentation of argument to arrive at a reasoned determination of the disputes.³¹

[48] In *Mlatsheni v Road Accident Fund*³² the court judged the RAF to be an organ of State, established in terms of section 2 of the Act. It uses public funds to comply with its duties in terms of the Act to pay compensation for loss or damage wrongfully caused by the driving of motor vehicles. As an organ of State it is subject to the Bill of Rights in Chapter 2 of the Constitution³³ which provides amongst others for the obligation of the State to respect, protect, promote and fulfil the rights in the Bill of Rights.³⁴ Section 237 of the Constitution requires that all constitutional obligations must be performed diligently and without delay. Litigation by organs of State is subject to their duty to further the public interest and their decisions must be aimed at doing so. It is expected of organs of State to behave honourably- to treat the public with dignity, openly and fairly.

[49] Unfortunately, the defendant in this matter deviated from the standard required of it to a disturbing degree. The plaintiff had attempted to limit the issues to be

²⁹ 2019 (6) SA 253 (CC) at [222]ff

³⁰ *Limpopo Legal Solutions v Eskom Holdings SOC Ltd* d [2017] JOL 38860 (CC) at [38]

³¹ *Venmop 275 ((Pty) Ltd and Another v Cleverland Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at [7]

³² 2009 (2) SA 401(E) at [12] to [17]

³³ 108 of 1996

³⁴ Above section 7(2)

adjudicated at an early stage through numerous letters it had addressed and transmitted to the defendant, to no avail. The defendant in its pleadings offered a bald denial of most of the allegations in the particulars of claim. During the first and second pre-trial conferences the defendant refused to consider the plaintiff's requests to limit the issues for adjudication. The matter awaited allocation for 7 days prior to the matter was referred to me, during which requests made for admissions with a view to limit the issues for adjudication were declined. Quantum for general damages was settled on the first day of the trial and only then was the reports of the orthopaedic surgeon and the gastroenterologist admitted. The defendant persisted with its demand that the actuary, industrial psychologist and occupational therapist give *viva voce* evidence in circumstances where it had not obtained expert reports of its own.

[50] The defendant called no witnesses to refute the evidence and testimony presented by the plaintiff. Neither the occupational therapist nor the actuary was cross examined. In the circumstances I find it incomprehensible on what grounds the actuary in the defendant's heads of argument in the circumstances could be accused of having been "*...misleading to say the least...He basically testified...that the Court cannot apply its own contingencies because of the RAF cap, which is untrue..*" The actuary did not so testify. To the contrary, in his report he states the opposite: "*General contingency deductions are a matter for negotiation between legal representatives or ultimately it is a matter for the Court to decide.*"³⁵ The actuary's evidence was that any possible permutation of loss of income exceed the statutory gap to such an extent that no conceivable difference would result on the claim for loss of earnings. This appears not to have been grasped.

[51] During the course of her testimony, the industrial psychologist stated that had the plaintiff received the benefit of medical care and therapeutic treatment sooner in the years since the collision to the date of trial, her situation may well have been ameliorated and her ability and capacity may not have been compromised to the extent it was. I am aligned with the remark of Davis J in

³⁵ CL08-150

Modise obo a minor v Road Accident Fund that the RAF persistently fails to appreciate “...that every medical or ancillary intervention rendered pursuant to the furnishing of an undertaking might have a downward impact on the eventual quantum to be awarded. Scarring can be removed, orthopaedic remedial surgery can take place, a minor might be assisted in reaching his pre-accident learning potential, and the like. An injured person might be rehabilitated or retrained so as to enable them to compete better in the labour market. This all might result in a reduction of the eventual award for damages, including, in appropriate circumstances, even general damages.”³⁶

As regards the duties of legal practitioners, that court referred to³⁷ the Code of Conduct for Legal Practitioners which stipulates that all legal practitioners “...shall act in a manner that shall promote and advance efficacy of the legal process.”³⁸

[52] The conduct of the defendant in running the process of litigation in anticipation of the trial and the trial itself caused extensive and unnecessary time wastage. It also caused an increase in litigation related expenses which would not have been the case had it been done in accordance with the standard required. The plaintiff should not be burdened with the payment of attorney and client costs as a consequence of the manner in which the defendant conducted itself. The failure of the defendant to attend to the matter timeously and without delay prejudiced the plaintiff amongst others in that, as the testimony of the industrial psychologist shows, had she received further treatment sooner, she may have not been as badly affected by the consequences of the injuries she suffered.

[53] Having regard to all of the above, I find that a punitive cost order is warranted.

³⁶ 2020 (1) SA 221 (GP) at [3.5]

³⁷ Above at [4.5]

³⁸ Promulgated by the South African Legal Practice Council in terms of the *Legal Practice Act*, 28 of 2014; Government Gazette, 29 March 2019 No. 42337. It also provides: “A legal practitioner shall not abuse or permit abuse of the process of court...”

[54] Regarding the scale upon which costs should be awarded, Rule 67A(3)(b) provides the factors to be taken into account are the complexity of the matter, the value of the claim and the importance of the relief sought.

[55] The value of the claim is substantial. The importance of the claim for the plaintiff is apparent from the evidence. She was severely injured and requires continuing treatment as well as care to enable her to function adequately. This is dependent upon her claim being allowed.

[56] The matter was not usual for disputes of this kind in several respects as is clear from the testimony and legal issues involved. By virtue of the manner in which the defendant dealt with the matter, the plaintiff's legal representatives had to be ready and prepared to deal with possible permutations of factual, legal and technical aspects of the matter which would not have been the case otherwise. These issues were not trivial in nature and require a special effort.

[57] In the result, I find that costs on scale C are warranted.

Conclusion

[58] For the reasons set out above, I make the order as set out below.

Order

[59] The defendant is liable for 100% of the plaintiff's damages arising out of a collision which occurred on 22 October 2018.

[60] The defendant shall pay to the plaintiff by electronic fund transfer to Brugmans Incorporated Trust Account (account number 104 702 1479) maintained at ABSA Bank:

a. R 4 605 138.43 (Four million, Six Hundred and Five Thousand, One Hundred and Thirty-Eight Rand and Forty-Three Cents) ("the capital sum") calculated as follows:

i. Past hospital costs:

R 566 453.10

ii.	Past medical and para-medial costs:	R 256 429.33
iii.	Past and future loss of earnings:	R 3 032 256.00
iv.	General damages:	<u>R 750 000.00</u>
v.	Total:	<u>R 4 605 138.43</u>

within 14 days from the date of this order (“the payment date”);

- b. Interest at the rate of 15,5% per annum on the capital sum, calculated from the payment date to the date of final payment in the event of the defendant failing to pay the capital sum by the payment date;
- c. Costs of suit to date of judgment on the attorney and own client scale, which costs include, but are not limited to the following:
 - i. the costs attendant upon the preparation of reports and/or addendum reports and/or forms and affidavits, if any, of:
 1. Prof Schepers, Orthopaedic Surgeon;
 2. Prof Bizos, Gastrointestinal Surgeon;
 3. Dr Shevel, Psychiatrist;
 4. Ms Myburgh, Occupational Therapist;
 5. Ms Donaldson, Industrial Psychologist;
 6. GRS Actuarial Consulting (Actuaries);
 7. Mr Whittaker, Actuary.
 - ii. the reservation, preparation and attendance fees of:
 1. Ms Myburgh, Occupational Therapist (12 June 2024);
 2. Ms Donaldson, Industrial Psychologist (12 and 13 June 2024);
 3. Mr Whittaker, Actuary (13 June 2024);
 - iii. the costs of counsel where so reasonably employed on scale C;
 - iv. the costs incurred by the plaintiff in respect of the attendance of all medico-legal examinations (which includes accommodation and travel expenses if applicable);

- v. the costs in respect of the preparation and perusal of the bundles used for trial purposes and the uploading thereof to CaseLines;
- d. Subject thereto that the plaintiff shall:
 - i. serve the notice of taxation on the defendant's attorneys of record, if such costs are not agreed upon;
 - ii. allow the defendant 14 court days to make a full payment of the taxed costs;
 - iii. failing which interest will be payable at the rate of 15.5% from the date of taxation,

[61] The defendant shall furnish an undertaking as envisaged in Section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, as amended, to the effect that the Defendant shall compensate the Plaintiff in respect of 100% of:

- a. the costs of the future accommodation of the Plaintiff in a hospital or nursing home;
 - b. the treatment of the plaintiff;
 - c. the rendering of a service to the plaintiff; and
 - d. the supplying of goods to the plaintiff,
- after such costs have been incurred and on proof thereof arising from injuries sustained by the plaintiff, which forms the subject matter of this action.

N. S. KRÜGER

NAME OF JUDGE

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this

matter on CaseLines. The date of the judgment is deemed to be **13 September 2024**.

For the plaintiff:

Adv P Uys instructed by Brugmans Incorporated

For the defendant:

Ms P Makhathini, State Attorney

12 -13 June 2024; 12 August 2024

Date of hearing and
argument:

Date of judgment: 13 September 2024

